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Supreme Court, U.
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MICHAEL RODAK, JR., C

No.

In the
Supreme Court of the United States
October Term, 1971

SAM ADAM,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2-4
REASONS FOR GRANTING THE WRIT	5-6
The decision below violates the Fourth, Sixth and Fourteenth Amendments and conflicts with decisions of other courts	
CONCLUSION	6
APPENDIX (Opinion and Judgment of Supreme Court of Illinois)	1a

CITATIONS

In Re Dionisio, 442 F. 2d 276	5
In Re Grand Jury Investigation, 444 F. 2d 499	5
In Re Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F. 2d 199	5
In Re Riccardi, 337 F. Supp. 253	5
In Re September 1971 Grand Jury, 454 F. 2d 580	5
Johnson v. Zerbst, 304 U.S. 458	6
United States v. Bailey, 327 F. Supp. 802	6
United States v. Praigg, 336 F. Supp. 480	6

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Sam Adam, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered January 28, 1972.

OPINION BELOW

The opinion of the Supreme Court of Illinois, 280 N.E. 2d 205, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 28, 1972. A timely petition for rehearing was denied on March 29, 1972, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. DOES THE FOURTH AMENDMENT PROTECT A LAWYER FROM BEING COMPELLED TO TESTIFY AGAINST HIS CLIENT BEFORE A GRAND JURY UNLESS THE STATE FIRST SHOWS THE REASONABLENESS OF THE GRAND JURY'S REQUEST FOR SUCH TESTIMONY?

2. MAY A LAWYER SUMMONED BEFORE THE GRAND JURY TO TESTIFY ABOUT COMMUNICATIONS WITH HIS CLIENT—A PREVIOUS WITNESS BEFORE THE SAME GRAND JURY—LAWFULLY ASSERT THE CLIENT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE?

STATEMENT OF THE CASE

Petitioner is a member in good standing of the bar of this Honorable Court. He has been adjudged in contempt for refusal to answer three questions about his client, one Shirley Walker, before the Cook County Grand Jury. Petitioner's refusal to answer was predicated upon his own Fourth Amendment right of security, his client's Sixth Amendment right to counsel, and the attorney-client privilege. Petitioner specifically has disavowed any fear of self-incrimination.

The facts arose as follows: Shirley Walker, an admitted prostitute and narcotic addict was charged with murder and incarcerated in jail. While there, and without benefit of counsel, she was prevailed upon by the police and the State's Attorney to sign a statement implicating four others in the murder, who were then arrested. Thereupon, she was taken from the jail to a motel and provided with

every luxury. At her first opportunity, however, Miss Walker escaped, immediately contacted the lawyer (not petitioner) for one of the four she had implicated, and disavowed her fabrication. When the State's Attorney learned of Miss Walker's turnabout, Miss Walker was subpoenaed before the Grand Jury whereupon she retained petitioner as her counsel.

At first, Miss Walker refused to answer any questions before the Grand Jury, but after the Assistant State's Attorney assured the court that "nothing will in any way incriminate her", she answered all questions put to her about the murder. Later the same day, however, another Assistant State's Attorney revealed to a different judge that the true purpose in subpoenaing Miss Walker was in order to compel her to incriminate herself with respect to possible charges of perjury and obstruction of justice. The next day, when the State's perfidy was revealed, the State's position changed again and the State informed the Court that it was a Chicago Police Officer who was the subject of the "investigation" by the grand jury.

Miss Walker was then granted immunity, but when she attempted to inform the Grand Jury about certain corruption within the Chicago Police Department, the State's Attorney switched the tenor of the questions to the circumstances under which she obtained her counsel (Petitioner herein) and her conversation with him.

After Miss Walker supposedly answered (we say "supposedly" because only the State's Attorney has a copy of the minutes) these questions, Petitioner was called before the same Grand Jury and asked the same questions. Petitioner refused to answer on the grounds that the State's Attorney's office was obviously engaged in harassing Miss

Walker (and, incidentally, Petitioner); that no purpose for the inquiry of Petitioner had been stated; that Petitioner's Fourth Amendment right of security and privacy was being infringed; and that Miss Walker's Sixth Amendment right to counsel and the attorney-client privilege was at stake.

However, Petitioner specifically disavowed any Fifth Amendment claim and in fact invited the State's Attorney to ask Petitioner any questions about *himself*.

Petitioner was thereupon taken before the court, adjudged in contempt and sentenced to ten (10) days incarceration.

Bail was granted and on appeal the Supreme Court of Illinois affirmed as to two questions (and reversed and remanded as to one) holding that Petitioner had no Fourth Amendment right under the circumstances, and that Miss Walker had waived the attorney-client privilege by testifying albeit under a subpoena and grant of immunity.

In order to demonstrate that Miss Walker did not in fact waive the attorney-client privilege, Petitioner moved that her Grand Jury testimony be made available either to Petitioner or to the Illinois Supreme Court *in camera*. The motion was denied.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS AND CONFLICTS WITH DECISIONS OF OTHER COURTS.

Petitioner's refusal to answer the questions was predicated upon the following propositions: That the Fourth Amendment requires some showing of reasonableness before a witness may be compelled to testify before the Grand Jury; and that Miss Walker's Sixth Amendment right to counsel and the attorney-client privilege compelled Petitioner to remain silent.

The Illinois Supreme Court summarily rejected the Fourth Amendment argument, 280 N.E. 2d at 207, and also held that by answering the questions herself, Miss Walker had waived the attorney-client privilege.

I.

The Illinois Supreme Court's decision in the case at bar directly conflicts with two recent decisions of the Seventh Circuit Court of Appeals, *In Re Dionisio,* 442 F.2d 276, and *In Re September 1971 Grand Jury,* 454 F.2d 580, (Certiorari granted, May 30, 1972, in both cases, *sub nom United States* v. *Dionisio,* 71-229, and *sub nom United States* v. *Mara,* 71-850, respectfully); with two decisions of the Court of Appeals for the Third Circuit, *In Re Grand Jury Proceedings, Harrisburg, Pennsylvania,* 450 F.2d 199 (Certiorari granted *sub nom United States* v. *Egan,* December 14, 1971, 71-263), and *In Re Grand Jury Investigation,* 444 F.2d 499, 3 Cir., 1971; and with *In Re Riccardi,* 337 F. Supp. 253, D.C.N.J., 1972; *United*

States v. *Bailey*, 327 F. Supp. 802, D.C.Ill., 1971; and *United States* v. *Praigg*, 336 F. Supp. 480, D.C., Calif., 1972; all of which decisions hold that a grand jury witness may successfully assert Fourth Amendment guarantees.

II.

The Illinois Supreme Court's conclusion that by testifying Miss Walker waived the attorney-client privilege is without any factual or legal basis whatsoever. No one, except the State's Attorney, has seen her testimony. The Supreme Court not only refused to make her testimony available to Petitioner, but also denied Petitioner's motion that the court itself examine her testimony *in camera* to determine whether she knowingly and intelligently waived her constitutional guarantees. See *Johnson* v. *Zerbst*, 304 U.S. 458. Furthermore, how could any "waiver" be deemed voluntary when given pursuant to a subpoena and under the compulsion of an immunity grant?

CONCLUSION

To resolve these important questions of clearly Constitutional dimensions, Petitioner prays that the Court grant the instant petition for writ of certiorari and reverse the judgment and conviction below.

Respectfully submitted,

R. Eugene Pincham
Edward M. Genson
Arnette R. Hubbard
Counsel for Petitioner

APPENDIX

Docket No. 44722—Agenda 32—November, 1971.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. SAM ADAM, Appellant.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Defendant, Sam Adam, appeals from the order of the circuit court of Cook County adjudging him in contempt of court and sentencing him to 10 days in the House of Correction. We allowed his motion for leave to file an original action in *habeas corpus* and have consolidated the original action and the appeal for consideration and opinion.

The record shows that Shirley Walker was called to testify before the September, 1971, Cook County grand jury which was investigating an alleged obstruction of justice in a police investigation of a murder. Defendant Adams, Miss Walker's attorney, was called to testify before the same grand jury. He testified that he was her attorney and, although ordered to do so by the circuit court, he refused to answer the following questions:

> "1. When did you become the lawyer for Shirley Walker?
>
> 2. Would you tell the Ladies and Gentlemen of the Grand Jury the circumstances surrounding your employment as Shirley Walker's lawyer?
>
> 3. I now ask you, Mr. Adam, to inform this Grand Jury as to that conversation that took place between you and Miss Walker and Mr. Pincham on Tuesday morning, September 28, 1971, as you were enroute here to the Criminal Courts Building in Mr. Pincham's car?"

Defendant refused to answer the questions primarily on the ground that to do so would result in the disclosure of information protected by the attorney-client privilege, and secondarily on the ground that there was no showing of probable cause for "invading and violating his Fourth Amendment right to be secure in his person against unreasonable search and seizure." The circuit court found his refusal to answer to be contemptuous, imposed sentence, and these proceedings followed.

We consider first defendant's contention based upon the alleged violation of his rights under the fourth amendment. Although the authorities cited by the defendant tend to support his argument that an overly broad *subpoena duces tecum* may constitute an unreasonable search and seizure impermissible under the fourth amendment, we find no authority for the proposition that a grand jury must have probable cause to subpoena a witness to testify. We hold, therefore, that insofar as defendant's refusal to testify was based on the constitutional argument, the circuit court did not err in ordering him to answer the questions.

Defendant contends that all of the matters within the scope of the three qustions which he refused to answer are protected from compulsory disclosure by the attorney-client privilege. The People contend that assuming, *arguendo,* that the matters about which defendant was interrogated were privileged, Miss Walker had already testified regarding them and the privilege was thereby waived. Defendant argues that because Miss Walker had been granted immunity, her testimony was compelled and involuntary, and there was, therefore, no waiver of the privilege.

The attorney-client privilege exists in order that one who is, or seeks to become a client, may consult freely with counsel without fear of compelled disclosure of information communicated by him to the attorney whom he has employed, or seeks to employ. The essentials of its

creation and continued existence have been defined as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, Evidence, sec. 2292 (McNaughton Rev. 1961).

Counsel have not cited nor has our research revealed a case involving the precise issue here presented. We have examined a number of authorities, many of them conflicting, and conclude that the fact that Miss Walker testified after a grant of immunity and under compulsion is not dispositive of the issue of waiver. Under modern procedures process is available, with rare exception, to compel attendance of witnesses either in court or for deposition and in that sense, most testimony is given under compulsion. The decisive factor, therefore, is whether the privilege was timely asserted by the client for whose protection it exists.

The record before us does not contain the testimony of Shirley Walker before the grand jury. Defendant's brief, however, states that in her testimony she told the grand jury when she employed defendant, and also related the conversations held with defendant in Pincham's car while enroute from the latter's home to the Criminal Courts Building. It is also stated in defendant's brief that while she testified before the grand jury defendant waited outside the grand jury room and that she repeatedly left the grand jury room and conferred with defendant. Defendant does not argue that Shirley Walker was not aware of, and could not, therefore, waive the attorney-client privilege. Under the circumstances shown we need not and do not decide whether the answers to the first and third questions are privileged, because if so, the privilege was waived.

The second question presented an issue more difficult of resolution. Defendant's brief states that Miss Walker testified that she had heard of defendant and that she called his office and spoke with him, arranged to meet him, and retained him. None of these matters are privileged because the privilege applies only to communications made by Miss Walker to defendant. It cannot be determined from the record and briefs whether there were in fact privileged matters communicated to the defendant, and if so, in whose presence, and for what purpose, nor can it be determined whether Miss Walker testified to any such communications. Whether a series of questions might have covered matters, some privileged and some not, is pure conjecture. Under the circumstances, in refusing to answer the question in the form in which it was propounded, we are unable to say defendant was in contempt.

For the reasons herein set forth the petition for a writ of *habeas corpus* is denied. The judgment of the circuit court of Cook County adjudging the defendant guilty of contempt for refusal to answer questions 1 and 3 is affirmed, and as to question 2 is reversed and remanded for further proceedings.

Affirmed in part, and reversed in part and remanded, and writ quashed.

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vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	6

CITATIONS.

Cases.

Branzburg v. Hayes, 92 Sup. Ct. 2646 (1972)	5
Felber v. Foote, 231 F. Supp. 85 (D. Conn. 1970)	5
Gelbard v. United States, 92 Supp. Ct. 2357	3
In Re Dionisio, 442 F. 2d 276 (7th Cir. 1971)	3
People v. Adam, 51 Ill. 2d 46 (1971)	3, 5
United States v. Doe, 457 F. 2d 895 (2nd Cir. 1972)	4

Authorities.

McCormick, Evidence, p. 182 (1954)	5
8 Wigmore, Evidence, 557 (3rd Ed. 1940) (p. 555, McNaughten Rev. 1961)	5

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported at 51 Ill. 2d 46, 280 N. E. 2d 205 (1972).

JURISDICTION.

Jurisdiction is adequately alleged in the Petition.

QUESTIONS PRESENTED.

Whether the petitioner-attorney had a constitutional right to refuse to answer questions concerning the date he became an attorney for a named client and the conversation

had between him, his client and a third person while enroute to the Criminal Court absent a prior showing of probable cause by the grand jury.

STATEMENT OF THE CASE.

The petitioner was convicted of contempt of court for refusal to answer certain questions before the grand jury and sentenced to serve a term of ten days.

The petitioner was the attorney for a witness (Shirley Walker) who was called to testify before a grand jury investigating alleged obstruction of justice in the investigation of a murder. The petitioner was called to testify before the grand jury and, although ordered by the court to do so, refused to answer three questions:

"1. When did you become the lawyer for Shirley Walker?

2. Would you tell the Ladies and Gentlemen of the Grand Jury the circumstances surrounding your employment as Shirley Walker's lawyer?

3. I now ask you, Mr. Adam, to inform this Grand Jury as to that conversation that took place between you and Miss Walker and Mr. Pincham on Tuesday morning, September 28, 1971, as you were enroute here to the Criminal Courts Building in Mr. Pincham's car?"

On appeal, the Illinois Supreme Court rejected petitioner's claim that probable cause must be shown before he could be compelled to testify. The Court did not reach petitioner's contention that the questions called for privileged material. The Court held that the attorney-client privilege belongs to the client and that the client may waive the privilege. The Court then found on the basis of petitioner's own assertions in his brief, that the client had waived the privilege as to the material called for by the first and third questions.

As to the second question, the Court held that it was impossible to determine whether or not some of the matters called for by the question would be privileged.* Accordingly, the Court remanded for further proceedings in the trial court.

REASONS FOR DENYING THE WRIT.

The petitioner's initial contention is, in essence, that the Fourth Amendment requires a showing of probable cause before a grand jury may subpoena a witness and compel testimony. This was the question reserved in *Gelbard* v. *United States*, 92 Sup. Ct. 2357, 2360, n. 5.

The petitioner here was clearly called in his capacity as a witness. He was not either a target of the grand jury investigation nor a potential defendant. He has explicitly eschewed any fear of self-incrimination. To us that would appear to place the petitioner in a position different from the person subpoenaed in several of the cases he cites in support of his position. The witness who is requested to give handwriting or voice exemplars (which are not protected by the Fifth Amendment) may have a real concern for his self-protection which in turn might justify the requirement of probable cause before he is compelled to give exemplars. See *In re Dionisio*, 442 F. 2d 276 (7th Cir. 1971) cert. granted sub nom *United States* v. *Dionisio*, 92 Sup. Ct. 2056 (1972).** Further, at least one Court of Ap-

* The Court did indicate that some of the material would not be privileged:

> "Defendant's brief states that Miss Walker testified that she had heard of defendant and that she called his office and spoke with him, arranged to meet him, and retained him. None of these matters are privileged because the privilege applies only to communications made by Miss Walker to defendant." People v. Adam, 51 Ill. 2d at 49.

** The fact that Dionisio is factually distinguishable from this case and that there is a stronger rationale for the decision in Dionisio than is present here does not mean that respondent concurs with the decision in Dionisio. It would be our view that Dionisio is wrongly decided.

peals has found even the rationale in Dionisio unpersuasive. In *United States* v. *Doe*, 457 F. 2d 895 (2nd Cir. 1972), stay granted *Doe* v. *United States*, 92 Sup. Ct. 2055 (1972), the Court held that:

> "In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject of course to . . . the Fifth Amendment . . . when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest requirement as a showing of 'reasonableness'—with the delay in the functioning of the grand jury which that would inevitably entail," 457 F. 2d at 899-900.

Regardless of the merits of the decisions cited by petitioner, it seems to us that no construction of the Fourth Amendment can justify requiring the government to show probable cause to compel testimony from one who appears solely as a witness and not as a potential defendant. If the Fourth Amendment erects a barrier between grand jury and witness, the same barrier stands between the court and the witness at trial and the same barrier stands in civil as well as criminal cases. Surely such a result was not intended by the draftsmen of the Fourth Amendment and surely policy considerations would not sanction this new extension of the Fourth Amendment.

The petitioner also claims that the attorney-client privilege was violated in his case. The Illinois Supreme Court did not reach the question of the applicability of the privilege because it decided that if there were privilege, the privilege was waived by the client's testimony before the grand jury. The petitioner criticizes the record on which this determination was made, but he lacks standing to do so for it was his brief on appeal that the Court relied upon:

> "Defendant's brief, however, states that in her testimony she told the grand jury when she employed de-

fendant, and also related the conversations held with defendant in Pincham's car while enroute from the latter's home to the Criminal Courts Building. It is also stated in defendant's brief that while she testified before the grand jury defendant waited outside the grand jury room and that she repeatedly left the grand jury room and conferred with defendant. Defendant does not argue that Shirley Walker was not aware of, and could not, therefore, waive the attorney-client privilege. Under the circumstances shown we need not and do not decide whether the answers to the first and third questions are privileged, because if so, the privilege was waived." *People* v. *Adam,* 51 Ill. 2d at 48-49.

Even if there were no waiver, the question of privilege can not be resolved by this Court. There is no federal requirement that the States recognize or enforce any attorney-client privilege. The attorney-client privilege may be, and often is, extended to differing degrees in the various States. Wigmore thought the privilege should be narrowly limited. See *8 Wigmore, Evidence,* pp. 557-58 (3rd Ed. 1940) (p. 554, McNaughten Rev. 1961). McCormick said "it would be hard to maintain that a privilege for lawyer-client communication would facilitate more than it would obstruct the administration of justice. *McCormick, Evidence,* p. 182 (1954). See also *Branzburg* v. *Hayes,* 92 Sup. Ct. 2646, 2660 N. 29 (1972). The petitioner gratuitously assumes that the attorney-client privilege is required by the Constitution. Yet it is clear that even a long-standing privilege (with arguably greater justification) such as the physician-patient privilege has no constitutional sanction. See *Felber* v. *Foote,* 321 F. Supp. 85, 87-88 (D. Conn. 1970) (three judge court). The notion that a privilege can be extrapolated as supportive in an indirect way of other constitutional guaranties was laid to rest in *Branzburg* v. *Hayes,* 92 Sup. Ct. 2646 (1972).

Simply stated, there is no federal issue presented by the ruling below that there was a waiver of privilege because there is no federal right involved in the waiver.

CONCLUSION.

For the foregoing reasons, the respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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